

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matters of	)	
	)	
International Comparison and Consumer	)	GN Docket No. 09-47
Survey Requirements in the Broadband	)	
Data Improvement Act	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of	)	GN Docket No. 09-137
Advanced Telecommunications Capability	)	
to All Americans in a Reasonable and	)	
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant to	)	
Section 706 of the Telecommunications	)	
Act of 1996, as Amended by the	)	
Broadband Data Improvement Act	)	

**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.  
-- NBP PUBLIC NOTICE # 24**

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**I. INTRODUCTION: THE ISSUE OF CONSUMER TRANSPARENCY REGARDING FIXED SERVICES IS ADEQUATELY BEING ADDRESSED IN OTHER PROCEEDINGS. THE PRIVACY ISSUES RAISED IN THE PUBLIC NOTICE ARE EITHER COMPLEX MATTERS NOT SUITED TO SUCH NOTICE OR ARE BEING CONSIDERED BY THE FTC.**

Qwest Communications International Inc. (Qwest) submits these comments in response to the Commission's *Public Notice* in the above-referenced dockets.<sup>1</sup> We address a single issue raised by the *Notice* -- consumer transparency regarding fixed services (as defined in the *Notice* to mean "fixed residential and small business internet broadband services"). And we address that issue only briefly in light of the fact that the comments we filed earlier in the 2009

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<sup>1</sup> *Public Notice*, GN Docket Nos. 09-47, 09-51, and 09-137 "Comment Sought on Broadband Measurement and Consumer Transparency of Fixed Residential and Small Business Services in the United States," NBP Public Notice # 24, DA 09-2474, rel. Nov. 24, 2009.

*Consumer Information and Disclosure NOI*<sup>2</sup> are directly on point with respect to a number of questions in the *Notice*. Those comments (attached here as Attachment A) demonstrate the policy, behavioral and constitutional challenges facing the Commission in any pursuit of a governmentally-defined “transparency” agenda outside or beyond the information and transparency already extant in the marketplace.

Beyond the issue of transparency regarding broadband internet services, the privacy issues raised in the “consumer transparency” set of questions in the *Notice* are not well suited to a *Notice*-type of inquiry. The issues either are very complex, both from a policy and legal perspective (such as what limits might the government put on a service provider’s collected customer information) *or* they are currently being reviewed and managed by the FTC (such as how providers should display privacy policies).

In all events, no Commission action is necessary on the issues raised under the “consumer transparency” topic.

**II. OTHER PROCEEDINGS DEALING WITH CONSUMER TRANSPARENCY IN ASSESSING SERVICES (THAT WOULD INCLUDE CONSUMER AND SMALL BUSINESS INTERNET BROADBAND SERVICES), DEMONSTRATE THAT THERE IS NO NEED FOR THE GOVERNMENT TO INTERVENE IN THIS AREA.**

The *Public Notice* acknowledges the relationship between it and the outstanding 2009 *Consumer Information and Disclosure NOI*.<sup>3</sup> The *Public Notice* seeks to “expand on questions asked [in the earlier *NOI*,] regarding service quality (specifically measuring tracking and reporting of Fixed Services).”

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<sup>2</sup> *In the Matter of Consumer Information and Disclosure, Truth-in-Billing and Billing Format, IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, and WC Docket No. 04-36, Notice of Inquiry, FCC 09-68 (rel. Aug. 28, 2009).

<sup>3</sup> The *Public Notice* “seek[s] to gather additional information on a specific sub-set of the services covered” by the earlier *NOI*.

Any regulation by the Commission in this area (should it be able to fashion a meaningful Title I argument with respect to broadband non-common carrier services in the first instance) must be guided by First Amendment principles that protect the speech that providers choose to make against unwarranted government intervention. In the event these constitutional hurdles can be overcome, any Commission-prescribed principles should be broad and principled-based, rather than detailed. Such principles should allow significant service provider flexibility regarding what information is conveyed and how it is conveyed.<sup>4</sup> In this analysis, care must be taken to accommodate not only the speech rights of the service providers as speakers but those of their audience (be they current or potential customers).<sup>5</sup>

With respect to what information service providers should make available to their customers, potential customers, the public, or regulators,<sup>6</sup> the answer is “as much as those providers deem appropriate given their market position.” In a competitive market, some providers will distribute more information than others; they will distribute the information through different mechanisms and venues; and they will fashion their communications to certain audiences. This is all evident from the comments filed in the *2009 Consumer Information and Disclosure NOI*. Those comments indicate quite clearly that service providers already provide volumes of information to customers and potential customers. Third parties provide even more

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<sup>4</sup> Many parties commenting in the *2009 Consumer Information and Disclosure NOI* argued that the existing Truth-in-Billing rules provided an example of a principle-based regulation, where the outcome is prescribed, e.g., bills must have appropriate descriptions, but how the outcome is achieved is left to the provider.

<sup>5</sup> See *U.S. WEST v. FCC*, Case No. 98-9518, 182 F.3d 1224, 1232 (10<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (*U.S. WEST v. FCC*). And see *Sorenson v. FCC*, 567 F.3d 1215, 1225-26 (10<sup>th</sup> Cir. 2009).

<sup>6</sup> Questions 2, 3, 4 and 6.

information, including comparative information. In such an environment, the need for (and justification for) any government intervention is absent.

Particularly regulators should not be telling service providers “[w]hat information [they should] display and communicate to potential new customers when advertising offerings[.]”<sup>7</sup> This is particularly true given the broad enforcement powers governmental agencies have to take action against service providers acting unreasonably, deceptively, or unfairly. Indeed, the FTC’s enforcement actions outlined in its comments in the *2009 Consumer Information and Disclosure NOI*<sup>8</sup> are a testament to the adequacy of an enforcement remedy to protect the public interest over one manipulating private speech. To the extent any particular provider is deemed to be acting in a manner that is unreasonable or deceptive or unfair, the enforcement authority lodged in both the Commission and the FTC are more than capable of protecting the public interest.

### **III. SERVICE PROVIDERS SHOULD HAVE FLEXIBILITY IN THE CONTENT AND PLACEMENT OF PRIVACY POLICIES AND IN HOW THEY USE THEIR CUSTOMER INFORMATION.**

One aspect of the *Public Notice* that was not incorporated into the *2009 Consumer Information and Disclosure NOI* is reflected in Question 5 of the instant *Notice*. One sub-

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<sup>7</sup> Question 2. Qwest is aware that the FTC filed comments in the *2009 Consumer Information and Disclosure NOI* urging the Commission to take certain actions with regard to service provider disclosure, including advertising. See Comments of the Federal Trade Commission, CG Docket No. 09-158, CC Docket No. 98-170 and WC Docket No. 04-36 at 4-6, filed Oct. 28, 2009 (FTC Comments). This is not the appropriate forum to debate the FTC’s position in any depth. Suffice it to say that: (a) the FTC acknowledges the constitutionally-protected nature of commercial speech, including advertising (*id.* at 2 notes 4 and 5); and (b) the FTC Act *already* requires that advertising be truthful and not misleading, and require substantiation in certain circumstances (*id.* at note 8); and (c) its proposal regarding price advertising (*i.e.*, that any advertised price include all taxes and fees; *id.* at 4-6) is unworkable (particularly on television) and would seriously depress protected speech. To the extent there are other means by which non-deceptive price communications can occur, those would have to be considered in relation to a particular government proposal and prior to any formal government intervention.

<sup>8</sup> See FTC Comments at 5 and note 12; 9 and note 27; 10 notes 29 through 31; 11-12 and note 34; 13 and note 38; 14 and note 39; 15 and note 40.

question asks how the Commission might ensure that consumers have adequate privacy protection with respect to Fixed Services. As Qwest argued in its comments in response to Public Notice #21,<sup>9</sup> and as attested to by the FTC,<sup>10</sup> the issues of privacy and security in the context of online services are ones the FTC has been actively involved with for years. The balances that should be considered with respect to commerce and privacy continue to be addressed by a variety of constituents in workshops and proceedings before that Commission. And the general topic of service providers' privacy policies has long been one regarding which the FTC has provided direction, guidance and enforcement. With respect to this Commission's National Broadband Plan, these matters should be expressly noted as being addressed by the Commission's sister agency -- the FTC. Nothing further is necessary.

The *Public Notice* also asks "What limits should be placed on the use of customer information?"<sup>11</sup> (again in the context of Fixed Services). Read literally, the question presupposes that government should place some limits on such use. Qwest disagrees with the assumption from a public policy, as well as First and Fifth Amendment, perspectives.

From a public policy perspective, the restriction of information is not a *per se* public benefit. Restricting the use of information in the name of privacy has real costs and can actually work against public economic and social welfare.<sup>12</sup> Moreover, absent a constitutionally-sound

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<sup>9</sup> Comments of Qwest Communications International Inc. – NBP Public Notice #21, GN Docket Nos. 09-47, 09-51 and 09-137 at 5-6 and n.12, filed Dec. 9, 2009. These comments are attached as Attachment B.

<sup>10</sup> See Federal Trade Commission *Comments – NBP Public Notice #21*, GN Docket Nos. 09-47, 09-51, and 09-137, filed Dec. 9, 2009 at 1.

<sup>11</sup> Question 5.c.

<sup>12</sup> *U.S. WEST v. FCC*, 182 F.3d at 1234 and note 7 (addressing a variety of costs that privacy imposes, and citing to Fred H. Cate, *Privacy in the Information Age* at 19-22, 28-30 (1997). With respect to commerce, specifically, the Court noted that Professor Cate observed that "privacy interferes with the collection, organization, and storage of information which can assist

First Amendment analysis, the government is not in a position to restrict how a service provider uses information about its own customers.<sup>13</sup>

Nor can such restriction be accomplished without a disciplined Fifth Amendment analysis. A service provider's information about its customers is an asset of the service provider. Any Commission action that divested a service provider of its ownership interest would amount to a taking of private property.<sup>14</sup>

This is not to say that individuals do not have an interest in personally-identifiable information held by their service providers and other businesses. They certainly do. But unless the government demonstrates that service providers are highly likely to act unreasonably and irresponsibly in managing this balance in the absence of government intervention, any such action is premature and likely unconstitutional.

Independent of the policy and legal arguments outlined above, the fact remains that service providers today generally describe for their customers what information they collect, how they use it, and what their disclosure practices are. To the extent that providers' actions are in line with their representations, nothing more is required. This is particularly true given the highly competitive market for Fixed Services and the ability of individuals to vote with their feet in the event they are dissatisfied with their provider's policies. And, as discussed above, with respect to recalcitrant service providers, enforcement action is always available to protect the public against unreasonableness, deception or unfairness.

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businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy may lead to a reduced productivity and higher prices for those products or services.”).

<sup>13</sup> *Id.*

<sup>14</sup> See discussion of this matter in Petitioner's Brief at 36-41 and Petitioner's Reply Brief at 18-23 in *U.S. WEST v. FCC*. These briefs are attached as Attachments C and D and are incorporated by this reference.

Respectfully submitted,

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December 14, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. -- NBP PUBLIC NOTICE # 24** to be: 1) filed with the FCC via its Electronic Comment Filing System in GN Docket Nos. 09-47, 09-51 and 09-137; and 2) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

/s/Richard Grozier

December 14, 2009